

STATE OF MICHIGAN  
COURT OF APPEALS

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PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

YVONNE DUNN BUSCH,

Defendant-Appellant.

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UNPUBLISHED

April 25, 2006

No. 258819

Wayne Circuit Court

LC No. 04-006885-01

Before: Markey, P.J., and Schuette and Borrello, JJ.

PER CURIAM.

Defendant appeals as of right her bench trial convictions for two counts of felonious assault, MCL 750.82. Defendant was sentenced to three years' probation, including anger management counseling and psychiatric evaluation, for the felonious assault convictions. We affirm defendant's convictions and sentence.

Defendant first argues that the evidence presented at trial was insufficient to sustain her convictions for felonious assault, and therefore, her convictions should be reversed. This Court reviews claims involving the insufficiency of the evidence de novo. *People v Mayhew*, 236 Mich App 112, 124; 600 NW2d 370 (1999). The Court reviews the evidence "in the light most favorable to the prosecutor and determines whether a rational trier of fact could find that the essential elements of the crime were proven beyond a reasonable doubt." *People v McKinney*, 258 Mich App 157, 165; 670 NW2d 254 (2003), citing *People v Johnson*, 460 Mich 720, 723; 597 NW2d 73 (1999). In doing so, "[c]ircumstantial evidence and reasonable inferences arising from that evidence can constitute satisfactory proof of the elements of the crime." *Id.*

The elements of felonious assault require the prosecution show that defendant committed: (1) an assault, (2) with a dangerous weapon, and (3) with the intent to injure or place the victim in reasonable apprehension of an immediate battery. *People v Avant*, 235 Mich App 499, 505; 597 NW2d 864 (1999). Defendant does not take issue with the first two elements of this offense but, instead, argues that the prosecution has failed to show the requisite "intent" element of the offense. Defendant argues that the evidence failed to show that she intended to harm or place the complainants in reasonable apprehension of an immediate battery. Defendant argues that the evidence clearly shows that defendant, who had a history of conflict with the complainants, did not intend to inflict any harm on them but merely sought to tease and taunt them. Such an argument is obviously open to interpretation and therefore best left to the trier of fact.

The prosecution presented sufficient evidence from which a reasonable trier of fact could find that defendant intended to place the complainants, Julie Recski and Amanda Daniels, in reasonable apprehension of an immediate battery when she used her truck to lunge at the complainants as they rode their bikes, causing them to veer off the road to avoid being hit by defendant's vehicle. "Intent, like any other fact, may be proven indirectly by inference from the conduct of the accused and surrounding circumstances from which it logically and reasonably follows." *People v Lawton*, 196 Mich App 341, 349; 492 NW2d 810 (1992). The complainants, former friends of defendant's teenage daughter, Megan Busch, testified that defendant used her truck and drove toward them as if she was about to hit them, but then she swerved away. Both complainants testified that defendant was on the opposite side of the road when they noticed defendant's truck and that defendant turned around to be on the same side where they were riding their bikes. At that point, defendant proceeded to drive her car toward the complainants, but swerved away just before hitting them. The complainants testified that defendant laughed as she drove away. Both complainants also testified they were frightened by the incident.

This Court has found that "the trier of fact may make reasonable inferences from direct or circumstantial evidence in the record." *People v Perkins*, 262 Mich App 267, 268-269; 686 NW2d 237 (2004). Moreover, "deference is given to the trial court's assessment of the weight of the evidence and credibility of the witnesses." *People v Shipley*, 256 Mich App 367, 373; 662 NW2d 856 (2003). Although Megan testified that she was in the car with defendant when the incident occurred, and that she and defendant did not retaliate against complainants when they made hand gestures at them, Megan's testimony is inconsistent with defendant's testimony, which a reasonable trier of fact could find gives credence to the testimony of the complainants. Megan testified that she and defendant were the only two in the car at the time of the incident; however, defendant testified that she, Megan and her two sons were in the car when the incident occurred. Megan also testified that defendant did not react at all to the hand gestures; however, defendant testified that she laughed at the complainants. Given the inconsistent testimony presented by Megan and defendant, and based on the actions of defendant, it is reasonable to infer that defendant intended to place the complainants in reasonable apprehension of an immediate battery when she drove her car in their direction. Thus, the prosecution sufficiently established the elements of felonious assault, i.e., that defendant committed an assault on the complainants, with a dangerous weapon, and that she did so with the intent to injure or place the complainants in reasonable apprehension of an immediate battery. *Avant, supra* at 505.

Defendant further asserts that she was denied her constitutional right to the effective assistance of counsel because trial counsel failed to produce character witnesses to rebut the prosecution's assault on her character. "Whether a person has been denied the effective assistance of counsel is a mixed question of fact and constitutional law. A judge must first find the facts, then must decide whether those facts establish a violation of the defendant's constitutional right to the effective assistance of counsel." *People v Grant*, 470 Mich 477, 484; 684 NW2d 686 (2004). Findings of fact are reviewed for clear error and questions of constitutional law are reviewed de novo. *Grant, supra* at 484. Because the trial court did not hold an evidentiary hearing, review is limited to the facts on the record. *People v Wilson*, 242 Mich App 350, 352; 619 NW2d 413 (2000).

Defendant has failed to demonstrate that she was denied the effective assistance of counsel. To establish a claim of ineffective assistance of counsel a defendant must show (1) that

trial counsel's performance fell below an objective standard of reasonableness and (2) that defendant was so prejudiced that she was denied a fair trial, i.e., that there is a reasonable probability that, but for counsel's errors, the result of the proceeding would have been different. *People v Walker*, 265 Mich App 530, 545; 697 NW2d 159 (2005). "Effective assistance of counsel is presumed, and the defendant bears a heavy burden to prove otherwise." *People v Mack*, 265 Mich App 122, 129; 695 NW2d 342 (2005). Thus, the defendant must overcome a strong presumption that defense counsel's action constituted sound trial strategy. *People v Pickens*, 446 Mich 298, 330; 521 NW2d 797 (1994); *Walker, supra* at 545.

Defendant argues that trial counsel's failure to present character witnesses denied her the effective assistance of counsel. According to defendant, trial counsel failed to present at least two witnesses who were prepared to testify on her behalf regarding her favorable treatment toward children. Defendant maintains that favorable character evidence would have provided reasonable doubt, which may have changed the outcome of the case.

Decisions regarding what evidence to present and whether to call or question witnesses are presumed to be matters of trial strategy, and therefore, this Court will not substitute its judgment for that of counsel regarding matters of trial strategy. *People v Davis*, 250 Mich App 357, 368; 649 NW2d 94 (2002). "The decision whether to call witnesses is a matter of trial strategy which can constitute ineffective assistance of counsel only when the failure to do so deprives the defendant of a substantial defense." *People v Hoyt*, 185 Mich App 531, 537-538; 462 NW2d 793 (1990). Defendant was not deprived of a substantial defense because, even if defense counsel presented character witnesses to testify on her behalf, such testimony would not have changed the outcome of the case. Although character evidence regarding defendant's good nature toward children may have portrayed defendant in a different light, such evidence would not have countered the overwhelming testimony presented by complainants regarding the incident.

Defendant has not provided any reason for this Court to conclude that trial counsel's failure to call character witnesses was anything but trial strategy. Defendant has also failed to show that she was denied a substantial defense because of trial counsel's failure to call character witnesses. Although defendant speculates that the character witnesses would have provided testimony favorable to her, the record is silent regarding how these witnesses would have created reasonable doubt. Defendant has failed to establish that she was denied the effective assistance of counsel.

Affirmed.

/s/ Jane E. Markey

/s/ Bill Schuette

/s/ Stephen L. Borrello